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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ———

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL UNION, PROGRESSIVE MINE WORKERS OF AMERICA, AND LOCAL NO. 403, PROGRESSIVE MINE WORKERS OF AMERICA, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit entered in this case insofar as it conditions enforcement of the Board's bargaining order upon the holding of a representation election.

OPINIONS BELOW

The opinion of the court below (Appendix A, pp. 15–32, *infra*) is reported at 319 F. 2d 428. The findings of fact, conclusions of law and order of the Board (J.A. 5–52, 97–118)[1] are reported at 139 NLRB 492.

[1] "J.A." refers to the portion of the record printed as a joint appendix to the briefs in the court of appeals. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1963, and a petition for rehearing *en banc* was denied (Judge Swygert dissenting) on August 15, 1963. A decree was entered on August 15, 1963 (Appendix A, pp. 33–35, 36–42, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the court of appeals erroneously declined to enforce an otherwise appropriate bargaining order of the National Labor Relations Board until the union in whose favor the order ran had demonstrated in a Board-conducted election that, notwithstanding the lapse of time since the commission of the unfair labor practice, it had the support of a majority of the employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in Appendix B (pp. 43–44, *infra*).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

For many years, Quality Coal Corporation and Brazil Block Coal Co. ("Quality") had recognized the United Mine Workers of America ("UMW") as the bargaining representative of the production employees and truck drivers at the strip mine in Indiana which they jointly owned and operated (J.A. 15–16; 149–150, 176–178, 181–182). Since some time prior to 1955,

Quality had been experiencing difficulty in making the payments of 40 cents per ton to the UMW welfare fund, as required by the UMW contract. Defaults in payment resulted in two suits by the union, in both of which the UMW won judgments (J.A. 16; 159–161, 547–551). In March 1961, Carl F. Kumpf, the president of Quality, negotiated the sale of the mine to the Lafayette Spring Coal Company (J.A. 13–14, 16; 170–172, 408–409). A new corporation, called Center Point, was formed to take over the mine, and it retained Kumpf, whose family acquired more than 20 percent of Center Point's shares, to manage the operation and handle the day-to-day labor relations, as he had done for Quality (J.A. 11, 13–15; 194–196, 408–412, 418–419). On March 31, 1961, Quality ceased mining operations and terminated the UMW contract effective May 31, 1961, by which time it had laid off the 36 employees covered by the agreement, all of whom were then UMW members (J.A. 15, 21–22; 148, 248, 307, 537–547, 557).

In the meantime, Kumpf sought to find some method whereby to reduce the payments made to the union's welfare fund (J.A. 18–19, 33). Upon the suggestion of four or five of the mine's employees, Kumpf visited representatives of the Progressive Mine Workers of America ("Progressive") in Harrisburg, Illinois on or about March 15, 1961 (J.A. 18–19, 32; 202–204). During this visit he learned that the payments under Progressive's plan amounted to only 20 cents per ton (J.A. 18; 202–203, 204–208). This information was reaffirmed at another meeting in Harrisburg

on or about April 15, at which Kumpf and the two other officers of Center Point met with representatives of Progressive (J.A. 18; 208).

On May 24, 1961, Kumpf met with officials of Progressive at Springfield, Illinois. He received a supply of Progressive authorization cards and came to a tentative agreement on the terms of a labor contract to cover the employees of Center Point (J.A. 20; 200, 219–222). On June 2, Kumpf received a draft of the tentative agreement, providing, *inter alia,* for recognition of Progressive as the exclusive bargaining representative and for the payment of 20 cents per ton to that union's welfare fund (J.A. 21, 33; 385–386, 421–422). Those arrangements were made at a time when UMW was the undisputed collective bargaining representative of the mine's employees and while Progressive did not have a single member among the employees (J.A. 20, 33–34).

Between June 2 and June 5, Kumpf engaged in a course of conduct directed at inducing the mine's employees to join Progressive. He explained to a meeting of 12 employees that he could not work under the UMW contract, and that the company intended to go into business affiliated with Progressive, adding that "if there is anyone that doesn't wish to belong to that organization, they can walk out right now * * *" (J.A. 22–23, 35; 283–284, 347–348). The assembled employees thereafter signed the Progressive authorization cards which Kumpf had brought to the meeting (J.A. 22–24, 35; 216, 285–286, 335–336). Kumpf had also arranged for a meeting between the em-

ployees and officers of Progressive, and this meeting was held on June 3 (J.A. 24; 220–221). After the meeting, at which Progressive was officially elected as bargaining agent, Kumpf was called in to sign the labor agreement he had negotiated with Progressive on May 24 (J.A. 24–25; 287–299, 223, 226).

On June 5, Center Point started preparatory work at the mine with five employees. This number gradually increased to 14, all except two of whom had previously worked for Quality. By September 11, 1961, when the strip mining operation had been fully resumed, it had a complement of 26 employees, 22 of whom were former Quality employees (J.A. 25, 100; 234, 556–559). All became members of Progressive, the employees who had not attended the June meeting having signed membership applications before they started work (J.A. 25; 311, 376).

Kumpf had met with an International Board Member of UMW on April 4, 1961, after UMW received notice of the termination of its contract. He then falsely informed the UMW representative that the company could not continue to operate and that the mine was shutting down (J.A. 27; 381–382). In fact, preparations for resumption of operations by Center Point were well under way at that time (J.A. 28).

On June 7, 1961, Kumpf met again with UMW officials at their request, and informed them, for the first time, that he had signed a contract with Progressive (J.A. 29–30; 383–385). When he was asked what the difference was between UMW and Progressive, Kumpf replied that Progressive's royalty

payment was only half that required under the UMW contract (J.A. 30; 384–386). The UMW Board Member then inquired whether Kumpf was going to rehire the employees who had worked for Quality, and asserted that the company was obliged to recall these employees. Kumpf replied that he had two partners and the decision "wasn't up to him." When the UMW representative asked for the names of the partners, Kumpf stated that it was "none of his business" (J.A. 30; 384–387).

B. THE BOARD'S CONCLUSIONS AND ORDER

On these facts, the Board found that Center Point took over and continued the Quality enterprise, that it had no reason to doubt that UMW continued to represent a majority of the employees at the time that it purchased the business, and that thus it, and Kumpf as its agent, violated Section 8(a)(5) of the Act by refusing to bargain with UMW on April 4 and June 7, and by executing a contract with Progressive (J.A. 27–30; 100–101). The Board further found that Center Point and Kumpf gave assistance and support to Progressive in violation of Section 8(a) (1) and (2) of the Act by (a) carrying on negotiations with it for a collective bargaining contract at a time when Progressive had no members at the mine and UMW was the recognized bargaining representative; (b) encouraging and soliciting the employees to choose Progressive as their bargaining representative instead of the UMW; and (c) executing a collective bargaining agreement with Progres-

sive at a time when it did not represent an uncoerced majority of the employees (J.A. 31–37, 99–101). Finally, the Board found that Progressive violated Section 8(b)(1)(A) of the Act by entering into a collective agreement with Center Point at a time when it did not represent an uncoerced majority of the employees (J.A. 101).[2]

The Board's order, in relevant part, required Center Point and Kumpf to cease and desist from giving effect to the illegal collective bargaining agreement with Progressive, and from the other unfair practices found (J.A. 105–106). A similar cease and desist order was directed against Progressive (J.A. 111). Affirmatively, the order required Center Point and Kumpf to bargain with UMW and to withdraw recognition from Progressive (J.A. 109).[3]

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals sustained the Board's findings that Center Point took over the Quality enterprise;

[2] The Board also found that Center Point and Kumpf violated Section 8(a) (3) and (1) of the Act by maintaining (outside the labor agreement with Progressive) an unlawful hiring practice which required membership in Progressive as a condition of employment (J.A. 102–103). The court of appeals held that the evidence did not support this finding (pp. 30–31, *infra*), and we do not seek review of this holding.

[3] The order also required Center Point and Progressive to reimburse the employees for dues and assessments paid under the illegal closed shop arrangement found by the Board (J.A. 110, 111–112). The court of appeals, having rejected the closed shop finding (note 2, *supra*), likewise declined to sustain this feature of the Board's order (pp. 31, 32, *infra*). We do not seek review of the court's action in this regard.

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that the majority status of UMW was not impaired when Center Point acquired the mine; and that Center Point had, therefore, violated its duty to bargain with UMW (pp. 27–28, *infra*). It also sustained the Board's finding of unlawful employer assistance to Progressive, and it enforced the cease and desist provisions of the Board's order directed to these violations (pp. 28–29, 32, *infra*).

The court denied enforcement, however, of the portion of the Board's order requiring Center Point to bargain with UMW, on the ground that Center Point need not bargain with any union claiming to represent its employees until such organization had demonstrated its majority status in an election to be held promptly by the Board. In the court's view, enforcement of the bargaining order "would be * * * disruptive of a peaceful *status quo*" since (1) approximately two years had elapsed from the date on which the employees had affiliated with Progressive, (2) the employees had not filed the charges in the Board proceeding,[4] and (3) no employee had complained of any coercion (pp. 31–32, *infra*).

REASONS FOR GRANTING THE WRIT

The court of appeals' refusal to enforce the Board's otherwise appropriate bargaining order unless the UMW demonstrates its present majority status at a Board-conducted election conflicts with a consistent line of applicable decisions of this Court. This departure from the well-settled rule is not justified by

[4] The complainant in the Board proceeding was the UMW (J.A. 6, 448).

any of the reasons stated in the opinion of the court of appeals or in the earlier Seventh Circuit decision upon which the court relied. Since the decision in the present case, which represents the considered view of the Seventh Circuit, conflicts with the rule announced in other circuits, its effect is to disrupt the uniform administration of the labor laws in certain important industrial States.

1. The court of appeals' decision conflicts with this Court's holdings in *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 748 n. 16; *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702; and *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U.S. 512. In the *Lorillard* case, as in the case at bar, the Board found that the employer had refused to bargain collectively with the duly selected bargaining agent of its employees, and it entered an order directing the employer to bargain with that union. As in the present case, the court of appeals sustained the Board's finding that the unfair labor practice had been committed, "but, expressing the belief that because of lapse of time and changed conditions the Local might no longer represent the majority of employees, modified the Board's order so as to require it to conduct an election to determine whether the Local had lost its majority due to a shift of employees to a rival independent association." 314 U.S. at 513. This Court reversed the court of appeals *per curiam*, noting that it "was for the Board to determine" (*ibid.*) whether the most appropriate remedy would be to direct the employer to bargain with the union

which had a majority on the date of the unfair labor practice.

In the *Franks Bros.* case a seven-month period had elapsed between the filing of the charges alleging a refusal to bargain and the issuance of the complaint by the Board. During this time the complaining union had lost its majority because some of its "original members had been replaced by new employees in the normal course of business." 321 U.S. at 703. The Board's final order, which directed the employer to bargain with the union despite its lack of a majority, was entered 16 months after the unfair labor practice had been committed, and this Court's decision, affirming enforcement of the Board's order, was issued almost three years after the original refusal to bargain. Nonetheless, the Court held that the Board could adopt a remedy "which requires that an employer bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal to bargain despite that union's subsequent failure to retain its majority." 321 U.S. at 704–705.

The well-established nature of the principle that the Board may remedy a Section 8(a)(5) violation by directing the employer to bargain with the union which had majority status on the date of the unfair labor practice was demonstrated by the summary rejection of the contrary view in the *Katz* case. The contention that a new election should have been required because the employees subsequently "repudi-

ated" the union was dismissed in a footnote noting that the argument "has no merit." 369 U.S. at 748 n. 16.

2. None of the reasons stated in the court of appeals opinion, or in its earlier decision in *Perry Coal Co.* v. *National Labor Relations Board,* 291 F. 2d 126 (C.A. 7), justifies a departure from the accepted rule. The lapse of time between the commission of the unfair labor practice and the decision of the court of appeals was approximately two years—no longer than the equivalent period in the *Franks Bros.* case and substantially shorter than the time which elapsed between the refusals to bargain and the court of appeals decisions in *Lorillard* (approximately 3½ years) and *Katz* (approximately 4 years). Nor should the fact that the union, rather than an individual employee, filed the unfair labor practice charge make any difference. In *Katz* (369 U.S. at 740), *Franks Bros.* (Record, No. 521, Oct. Term, 1943, pp. 3, 119) and *Lorillard* (Record, No. 71, Oct. Term, 1941, pp. 15–17) the charges were also filed by the aggrieved union and not by individual employees. And the court of appeals' observation that "[n]o employee has complained of any coercion" (p. 31, *infra*) is irrelevant since coercion is not an element of a Section 8(a)(5) violation.[5]

[5] If this finding of the court of appeals was intended to mean that no particular employee filed charges alleging coercion with the Board, its materiality is questionable in light of *Lorillard*, *Franks Bros.*, and *Katz*, in which no individual employee filed any charges whatever.

The additional fact, relied upon by the Seventh Circuit in the *Perry Coal* case, that another union has been representing the employees for a substantial period of time, does not justify the holding of a new election. For the employees' choice of the competing union is attributable to the very violations of Section 8(a)(5) and 8(a)(2) which constitute the basis of the Board's order. It was because Center Point refused to bargain with the UMW and supplied unlawful assistance and support to Progressive that the employees transferred their allegiance. In these circumstances, there could be no expression of free choice in an atmosphere untainted by an unfair labor practice. The employer would be profiting by its own wrong if an election were now held wherein the employees were asked to choose between the employer-assisted and the aggrieved unions. Cf. *Brooks* v. *National Labor Relations Board*, 348 U.S. 96.

When, as is true here, the employer's refusal to bargain is accompanied by assistance and support to a competing union—conduct which was not present in *Lorillard*, *Franks Bros.*, or *Katz*—a bargaining order of the kind entered in the present case is particularly appropriate so that "the effect of the prior unfair labor practices may be expunged." *International Association of Machinists* v. *National Labor Relations Board*, 311 U.S. 72, 82. Hence this is obviously not a situation in which the Board's remedy has been applied "without regard to circumstances which may make its application to a particular situation oppressive and

therefore not calculated to effectuate a policy of the Act." *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349. Although the Board did not expressly set out its reasons for ordering the employer to bargain with the UMW, the justification for such an order appears so clearly from the record and follows from the consistently approved practice of the Board in cases of this sort that no explication was necessary.

3. The decision in this case, which followed an identical ruling by the Seventh Circuit in *Perry Coal Co.* v. *National Labor Relations Board*, 284 F. 2d 910, 291 F. 2d 126, employer's petition for certiorari denied, 366 U.S. 949, apparently represents the considered view of the Court of Appeals for the Seventh Circuit. Courts of appeals in other circuits have, almost without exception, enforced such orders unconditionally in cases involving an employer's refusal to bargain.*

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* *National Labor Relations Board* v. *Whitelight Products*, 298 F. 2d 12 (C.A. 1), certiorari denied, 369 U.S. 887; *Joy Silk Mills* v. *National Labor Relations Board*, 185 F. 2d 732, 737 (C.A. D.C.), certiorari denied, 341 U.S. 914; *National Labor Relations Board* v. *J. C. Hamilton*, 220 F. 2d 492, 494 (C.A. 10); *National Labor Relations Board* v. *Swift & Co.*, 162 F. 2d 575, 582–585 (C.A. 3), certiorari denied, 332 U.S. 791; *National Labor Relations Board* v. *Harris-Woodson Co.*, 179 F. 2d 720, 723 (C.A. 4); *National Labor Relations Board* v. *Philamon Laboratories*, 298 F. 2d 176, 183 (C.A. 2), certiorari denied, 370 U.S. 919; *National Labor Relations Board* v. *Lambert*, 211 F. 2d 91, 94 (C.A. 5); *Armco Drainage and Metals Products, Inc.* v. *National Labor Relations Board*, 220 F. 2d 573, 577 (C.A. 6), certiorari denied, 350 U.S. 838; *Semi-Steel Casting Co.* v. *National Labor Relations Board*, 160 F. 2d 388, 392–393 (C.A. 8), certiorari denied, 332 U.S. 758; *National Labor Relations*

Accordingly, unless the decision of the court of appeals in this case is reversed, it will stand as an obstacle to the uniform enforcement of the Act by establishing a unique rule in the Seventh Circuit, which covers the important industrial States of Illinois, Indiana and Wisconsin.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1963.

Board v. *Deutsch Co.*, 265 F. 2d 473 (C.A. 9), certiorari denied, 361 U.S. 963.

In *National Labor Relations Board* v. *Marcus Trucking Co.*, 286 F. 2d 583, 594–595 (C.A. 2), enforcement was denied because "the interest being vindicated" was the two-year contract-bar rule, which could be effectively protected by other means. See *Philamon Laboratories*, *supra*.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 13991, 14001, 14043

SEPTEMBER TERM, 1962—APRIL SESSION, 1963

No. 13991

INTERNATIONAL UNION, PROGRESSIVE MINE WORKERS OF AMERICA, AND LOCAL NO. 403 PROGRESSIVE MINE WORKERS OF AMERICA, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 14001

CENTER POINT BLOCK COAL CORPORATION, AN INDIANA CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 14043

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

QUALITY COAL CORPORATION, BRAZIL BLOCK COAL AND CLAY CO., INC., AND CARL F. KUMPF, RESPONDENTS

On Petitions to Review and Set Aside, and on Petition for Enforcement of an Order of the National Labor Relations Board.

June 17, 1963

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

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CASTLE, *Circuit Judge.* These cases are before the Court on the petition of International Union, Progressive Mine Workers of America, and Local No. 403 Progressive Mine Workers of America [1] (Case No. 13991) and the petition of Center Point Block Coal Corporation [2] (Case No. 14001) filed pursuant to Section 10(f) of the National Labor Relations Act,[3] as amended, (29 U.S.C.A. § 160(f)) to review and set aside an order of the National Labor Relations Board [4] and upon the Board's petition under Section 10(e) of the Act (Case No. 14043) for the enforcement of that order.

The charges before the Board were filed by Local 7365, United Mine Workers of America.[5] None of the employees of Center Point were complainants.

The Board found and concluded, inter alia,[6] that Progressive violated Section 8(b)(1)(A) of the Act [7] and that Center Point violated Section 8(a)

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[1] Referred to herein as Progressive.

[2] Referred to herein as Center Point.

[3] All references herein to the "Act" are to the National Labor Relations Act, as amended. 29 U.S.C.A. § 151 *et seq.*

[4] The Board's Decision and Order are reported at 139 NLRB No. 8.

[5] Referred to herein as UMW.

[6] The Board's findings, conclusions and order also embrace Carl F. Kumpf, Brazil Block Coal and Clay Co., Inc., and Quality Coal Corporation but these parties did not petition for review of the order nor appear in opposition to the Board's petition for enforcement of the order as it applies to them.

[7] 29 U.S.C.A. § 158(b)(1)(A) which provides: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: * * *"

(1), (2), (3) and (5) of the Act.[8] The Board found that Progressive violated Section 8(b)(1)(A) by entering into a collective bargaining agreement with Center Point providing for exclusive representation at a time when Progressive did not represent an uncoerced majority of Center Point's employees and by receiving monies deducted and remitted by Center Point as union fees and dues pursuant to that agreement.[9] The Board found that Center Point refused to bargain with UMW in violation of Section 8(a)(5); unlawfully assisted and supported Progressive,

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[8] 29 U.S.C.A. § 158(a) (1), (2), (3) and (5) which provide: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; * * * (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * * (5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 159(a) of this title * * *"

The rights guaranteed to employees by Section 7 (29 U.S.C.A. § 157) are: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

[9] Board Member Brown found no justification for the finding that Progressive restrained and coerced employees by receipt of union fees and dues.

and carried on negotiations for the purpose of concluding and entered into a collective bargaining contract with Progressive at a time when that union did not represent an uncoerced majority of the employees involved, in violation of Section 8(a)(1)(2) and (5); and engaged in an illegal hiring practice in violation of Section 8(a)(1) and (3) by requiring membership in Progressive as a condition of employment.

The Board's order in so far as it applies to Center Point requires that it cease and desist from the unfair labor practices found, or in any other manner interfering with, restraining and coercing its employees in the exercise of their rights under the act. Affirmatively, the order directs Center Point to withdraw and withhold recognition from Progressive until it is certified by the Board; upon request to bargain collectively with UMW; jointly and severally with Progressive to reimburse all employees for dues and assessments together with interest at the rate of 6 per cent per annum; and to post designated notices. The order requires Progressive to cease and desist from giving effect to the collective bargaining agreement entered into with Center Point; from acting as the collective bargaining agent of Center Point's employees until certified by the Board; and from restraining or coercing in any like or related manner the employees of Center Point in their exercise of rights guaranteed by Section 7 of the Act. Progressive is directed to jointly and severally with Center Point make reimbursement to the employees of dues and assessments with interest, and to post designated notices.

The contentions advanced by Center Point and Progressive as grounds for setting aside the Board's order

and denying its enforcement require determination of the following contested issues:

(1) Whether the volume of interstate shipments from Center Point's operations is such that the Board properly asserted jurisdiction over it.

(2) Whether with respect to the employees involved Center Point is a successor employer to Quality Coal Corporation.

(3) Whether Center Point unlawfully assisted and supported Progressive.

(4) Whether Center Point by an unlawful hiring practice conditioned employment on membership in Progressive.

(5) Whether the employees' membership in Progressive and payment of dues and assessments were the result of coercion.

(6) Whether the Board's order in so far as it requires Center Point to bargain with UMW and directs the refunding of dues and assessments, with interest, is authorized and proper under the facts and circumstances of the case.

We have carefully reviewed the record, the intermediate report of the trial examiner, and the decision and order of the Board. Our review, in so far as factual findings of the Board are concerned, is limited to a determination of whether or not those findings are supported by substantial evidence on the record considered as a whole. Board findings so supported are conclusive. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 487–488.

With that rule in mind the following summarization of facts and circumstances upon which the

Board's findings and conclusions are based will serve as a preface to a consideration of the issues involved.

The Center Point strip mine, located near Center Point, Indiana, was operated, at least since 1955, by Quality Coal Corporation on lands owned or leased by Brazil Block Coal and Clay Co., Inc. Brazil received payments from Quality based on tonnage mined. By January 1958, Brazil had become the owner of Quality's assets and from then until May 31, 1961, Quality operated the mine through an arrangement under which it used Brazil's equipment, Brazil sold the coal, and Quality was paid on a cost-plus basis. During this period Carl F. Kumpf,[10] the president of both companies and a major stockholder of Brazil,[11] which had acquired all of the stock of Quality, was in sole charge of their operations. He handled the companies' employee relations, and negotiated and signed labor agreements, without consulting any of the other officers or directors.

For many years, Quality recognized the UMW as the bargaining representative of its production employees at the mine, including truck drivers, and through May 31, 1961 all employees in the unit were members of the UMW. On March 31, 1961, Quality ceased mining operations and gave UMW notice terminating the current collective bargaining agreement effective May 31, 1961, and by that date Quality had terminated all 36 employees covered by the contract. The UMW contracts called for payment of 40 cents per ton to the UMW welfare fund.

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[10] Hereinafter referred to as "Kumpf". His brother is referred to as Arthur Kumpf.

[11] A. E. Geisey, who had owned the other one-half of the shares sold them to Brazil in 1961.

In January 1961, a judgment against Quality in excess of $84,000, representing defaults in such welfare fund payments,[12] remained unsatisfied. An engineering firm which had recommended to Kumpf that a larger drag line be installed to increase production and to effect a profitable operation of the mine brought the situation to the attention of John Wade Bell, Jr. and C. F. Cunningham, officers of Lafayette Spring Coal Company of West Virginia, who were interested in additional coal mining investments, and indicated to them that Quality and Brazil could not pay for such an installation. Bell started negotiations with Kumpf to acquire the strip mine and by March 18, 1961, the properties had been appraised, abstracts of title furnished, and agreement reached as to the amounts to be paid for shares of stock in a new corporation. On that date, Center Point was incorporated for the purpose of purchasing and operating the strip mine. Lafayette Spring Coal Company acquired two-thirds of the 1,500 shares of its capital stock. The new corporation purchased a substantial portion of Brazil's assets, including leases, real property, office building, and machine shop in April 1961, and additional equipment and supplies in June. In addition to the equipment acquired from Brazil, Center Point leased the larger drag line as recommended. The assembly of the drag line started about June 5 and it was put into operation about September 5. Center Point continued to use the exclusive sales agent of Quality and Brazil, the Chicago firm of Bell and Zoller, and before starting its own stripping operations on September 5, purchased, pre-

[12] That judgment had been affirmed by this Court in *Lewis* v. *Quality Coal Corporation*, 7 Cir., 270 F. 2d 140.

pared and delivered to Bell and Zoller coal for out-of-state shipment valued in excess of $5,000. During the first two weeks of stripping operations Center Point sold coal mined by it to Bell and Zoller, priced at $20,000, some of which was shipped out of Indiana. The interstate shipments resulting from the business of Quality and Brazil had clearly come up to the Board's jurisdictional standards.

Kumpf continued to manage the mine for Center Point. While he was no longer the controlling stockholder, and now consulted with other members of the board of directors on policy matters, he did handle labor relations and conduct the day to day operation of the mine.

Kumpf had expressed a desire to operate the mine on a non-union basis and this was known among the former employees of Quality. Four or five of these employees suggested to him that he get information concerning the welfare plan of Progressive. On or about March 15, 1961, he made a trip to Harrisburg, Illinois, where he secured such information from a coal company operator, a Progressive representative, and a Progressive miner. He advised Bell and Cunningham of what he had learned, and on April 15, he and these two officers of Center Point again went to Harrisburg to find out "whether the Company would like this sort of an arrangement," and an officer of Progressive gave them the same information Kumpf had obtained concerning the Progressive welfare fund benefits, the fund's administration, and the amount paid in by the companies. Kumpf later explained the difference between the UMW contract and a Progressive contract as "in UMW welfare and retirement plan you paid 40 cents a ton royalty, in Progressive you paid 20 cents a ton."

On May 24, 1961, Kumpf met with officials of Progressive at Springfield, Illinois, where he received a supply of Progressive authorization cards and came to a tentative agreement on the terms of collective bargaining contracts to cover the employees of Center Point strip mine which included provision for the payment of 20 cents per ton to the Progressive welfare fund. Arrangements were tentatively made by Kumpf for a meeting with representatives of Progressive at Marshall, Illinois, on June 3, 1961.

Kumpf had promised some of the employees whose services were being terminated by Quality employment with Center Point. On June 2, Kumpf received drafts of the tentative agreements he had reached with Progressive on May 24, and on that evening presided at a meeting he arranged with 12 of the employees who had been terminated by Quality and 2 truck drivers of another company, who were on Quality's payroll when they did trucking at the mine. He spent about one and one-half hours explaining the information he had obtained about Progressive and going over the contents of a letter from Progressive's president explaining its organization and its welfare and retirement fund. He laid the authorization cards on the table and told the group what they were. There was credited testimony that Kumpf further told the group that he could not work under a UMW contract; that he had been in contact with Progressive and that "that is the way we wish to go into business, affiliated with them, and if there is anyone that doesn't wish to belong to that organization, they can walk out right now . . .". He then left the meeting together with the two truck drivers. When Kumpf returned, about 45 minutes later, he was told that the 12 employees had signed Progressive authori-

zation cards, were interested, but wished to meet with Progressive. Kumpf replied that tentative arrangements had been made for such a meeting, telephoned the president of Progressive, and confirmed the meeting for the following day. Arthur Kumpf, one of two spokesmen selected by the group retained possession of the signed authorization cards. Arthur Kumpf is a brother of Carl F. Kumpf. He was the relief drag line operator and mechanic for Quality and was paid a monthly guaranteed salary computed on the basis of a drag line operator's rate. He gave such directions to the truck drivers and others as the operation of the drag line required. If a man became ill he would give him permission to go home and would operate for him. Center Point employed him as a drag line operator.

On June 3, 1961, the 12 men who had attended the meeting went to Marshall, Illinois, by automobile. Kumpf furnished and drove one of the cars. They went to a motel room where Kumpf introduced the men to several representatives of Progressive and then left. The officials of Progressive read their standard labor contract to the men and discussed its welfare provisions, and the employees then voted to have Progressive as their bargaining agent. Arthur Kumpf then delivered the signed authorization cards to Progressive which thereupon immediately chartered a new union local (No. 403). Arthur Kumpf was elected president of the local and Progressive appointed him the district officer and an International Board Member. Kumpf was called back into the room and the collective bargaining agreement with Progressive was executed, to be effective June 5, 1961.

Center Point started operations at the mine on June 5. On that date 5 of the men who had participated

in the June 2 and 3 meetings started to work; three more on June 6, two on June 16; and, two on July 13. Fourteen other men, all except two of whom were also former employees of Quality, began working on various dates from June 6 to September 11. By September 11 (after resumption of stripping operations) Center Point had a complement of 26 employees at the mine, 22 of whom were former Quality employees. All were members of Progressive. The employees who had not attended the June 2 and 3 meetings signed membership application cards before they started work. Arthur Kumpf told one of these employees, William A. Thomas, two days before he reported for work that the mine "was either going to work Progressive or it wasn't to work at all." As others reported for work or were notified to return they were contacted by Arthur Kumpf or another officer of Local No. 403 and their applications for membership taken.

On or about April 4, 1961, W. W. Killion, an International Board Member of UMW, had met with Kumpf concerning the reason for Quality's notice terminating the UMW bargaining agreement. Kumpf advised him that the company had lost money for a long time and that he could not continue to operate any longer. When Killion stated that he had heard Kumpf was buying a new drag line and asked as to the future plans, Kumpf replied that he had been "working on a couple of things" which did not appear to be working out, and that the purchase of the new drag line was only one of a number of rumors. He stated he would have no objection to discussing a new agreement with UMW but "would have to wait and see if he—what he came up with".

Upon Killion's request, Kumpf met with him and another UMW representative on June 7, in the presence of four representatives of Progressive. These included Woodruff, with whom Kumpf had consulted in Harrisburg, and Arthur Kumpf and John Gettle, of Local No. 403. Killion reminded Kumpf of the April 4th conversation, and Kumpf disclosed to UMW for the first time that a contract had been signed with Progressive and explained that the payment required to the welfare fund of Progressive was only half that which was required under the UMW contract. When Killion inquired if the employees who worked for Quality would be rehired, Kumpf replied that "some would be, some would not be". Kumpf stated that the decision wasn't up to him; that he had two partners. He refused to name them stating that it was none of Killion's business.

Other factors to be gleaned from the record are that the employees involved had long been union adherents—they wanted union membership and the benefits of a welfare fund. On the other hand, their relationship with Kumpf had been close. When UMW had obtained an earlier $41,000 judgment against Quality for defaulted welfare fund payments the employees in 1957 loaned money to Brazil to purchase Quality's assets and help pay the judgment.

The contention that the operations of Center Point are not such that the Board should have asserted jurisdiction is without merit. The policy standards of the Board do not limit the jurisdiction conferred on it by Congress. *N.L.R.B.* v. *Chauffeurs, Teamsters & Helpers, Etc.*, 7 Cir., 274 F. 2d 19, 23–24. The $5,000 dollar volume of coal shipped interstate by Center Point prior to its commencement of stripping

operations in and of itself is sufficient to avoid the rule of *de minimis*, (*N.L.R.B.* v. *Aurora City Lines, Inc.*, 7 Cir., 299 F. 2d 229, 231) apart from consideration of application of the broader doctrine of *Polish Alliance of U.S. of North America* v. *N.L.R.B.*, 322 U.S. 643. Moreover, the Board could reasonably conclude that the employment of the larger drag line would result in increased production and interstate shipments in excess of those may by Quality and Brazil which had clearly come up to the Board's jurisdictional standards.

The record clearly establishes that there was no change in any essential attribute of the employment relationship when the mining operation was sold by Brazil to Center Point, which had been organized for the express purpose of the transfer. The nature of the business remained the same, the same kind of coal was mined and sold in the same manner through the same sales agent. The mine manager remained the same and 22 of Center Point's 26 employees were the same. Thus, "for all practical purposes there was continuity in the nature and functions of the same employing industry" and "no marked change in personnel". *N.L.R.B.* v. *Auto Ventshade, Inc.*, 5 Cir., 276 F. 2d 303; *N.L.R.B.* v. *Armato*, 7 Cir. 199 F. 2d 800. The test here is not whether Center Point is a successor corporation to either Quality or Brazil but whether Center Point is a successor employer of the same work force in the same enterprise. The Board's finding and conclusion that it is finds ample support in the record and in law.

Consequently, absent a fair doubt—one having a rational basis in fact—as to UMW's status as the bargaining representative of the majority of the em-

ployees in the unit it was Center Point's duty to recognize and bargain with UMW. *N.L.R.B.* v. *John S. Swift Company*, 7 Cir., 302 F. 2d 342. That 4 or 5 of the 36 employees in the unit had expressed an interest in Progressive was no basis for good faith doubt as to UMW's continued majority status. And this is especially so in view of the fact that such interest may well have been engendered or spurred by Kumpf's announced non-union inclinations. It was Center Point's duty to bargain with UMW and the Board was warranted in finding a refusal to so bargain in Kumpf's April 4 and June 7 conversations with Killion and Center Point's June 3 action in executing a bargaining agreement with Progressive.

The record substantially supports the Board's finding and conclusion that Center Point unlawfully assisted and supported Progressive. The April 15 meeting of Bell, Cunningham and Kumpf with an officer of Progressive at Harrisburg supports a conclusion that its purpose was not, as contended by Center Point, a trip by Kumpf as the agent of 5 of the employees to obtain information concerning employee benefits under the Progressive welfare plan—information Kumpf had obtained a month earlier but which, in so far as the record shows, he apparently had not as yet relayed to his claimed employee principals and which is urged as justification for the later June 2 meeting with the 12 employees—but was for the admitted purpose of finding out whether Center Point "would like this sort of an arrangement". When Bell and Cunningham verified the information Kumpf had earlier reported to them following his March 15 visit to Harrisburg, Kumpf proceeded to contact the president of Progressive and to negotiate a tentative collective bargaining agreement. It was

only after this preparation, and on the evening of the third day before the mine resumed operations, that Kumpf held the June 2 meeting with the 12 former Quality employees. It was then over 2½ months from the time he had secured the information with respect to which the 5 employees had expressed an interest. But on June 2 he was fulfilling the role of an advance agent for Progressive explaining its program to the 12 employees who were expecting to go to work for Center Point. The record does not justify a conclusion that Kumpf was merely expressing his opinion—privileged by Section 8(c). *Cf. N.L.R.B.* v. *Wagner Iron Works,* 7 Cir., 220 F. 2d 126, 138; *Harrison Sheet Steel Co.* v. *N.L.R.B.,* 7 Cir., 194 F. 2d 407, 410. And Center Point's reliance on cases such as *Chicago Rawhide Mfg. Co.* v. *N.L.R.B.,* 7 Cir., 221 F. 2d 165 is misplaced. Kumpf's activities constituted much more than laudable employer-employee cooperation. He assumed the lead in organizing the presentation to the employees of the case for Progressive affiliation. Their indoctrination was not left to Progressive. And, he already had a commitment for a collective bargaining agreement on the terms he had negotiated. Center Point's argument that Kumpf was acting merely for the employees and at their request carries no conviction. The Board was not in error in finding and concluding that Center Point unlawfully assisted and supported Progressive. Apart from Center Point's duty toward UMW it at least had the obligation of strict neutrality. *St. Louis Independent Packing Co.* v. *N.L.R.B.,* 7 Cir., 291 F. 2d 300.

No proof of coercive intent or result is necessary to establish an unfair labor practice on the part of an employer. *Time-O-Matic, Inc.* v. *N.L.R.B.,* 7 Cir.,

264 F. 2d 96. But when the remedy fashioned must find justification in the existence of coercion we are of the opinion that a finding of coercion must rest on more than unsupported inference. *Perry Coal Company* v. *N.L.R.B.*, 7 Cir. 284 F. 2d 910, 915, 916. And from a consideration of the record as a whole we are of the view that it does not substantially support a finding or conclusion that the employees of Center Point were coerced into membership in Progressive or into the payment of dues or assessments thereto. Center Point's assistance and support of Progressive and Kumpf's statement at the June 2 meeting did not, as we view the record, have such coercive effect. The employees, although they executed authorization cards, retained control of the cards, and decided to determine their course of action only after a meeting of their own with representatives of Progressive. It was after such meeting that they elected to affiliate with Progressive. These employees were union men acting in concert—there is nothing to indicate that they were unaware of their rights. And, a choice, to be free, need not be made in a vacuum.

The Board's finding of coercion appears to rest largely on its finding that Center Point maintained a hiring practice requiring membership in Progressive as a condition of employment. But the record does not support such finding. It is based on the activities and statements of Arthur Kumpf. But there is nothing to support the Board's conclusion that his solicitations of union membership or statements are attributable to Center Point. Whatever Arthur Kumpf's status with Quality may have been the record is barren of support that his employment with Center Point was in a supervisory capacity. It is

merely shown that Center Point employed him as a drag line operator.

We conclude that the record considered as a whole does not support findings or conclusions that Center Point conditioned employment on membership in Progressive or that the employees' membership in Progressive and the payment of dues and assessments were the result of coercion. The rationale of *Local 60, Carpenters* v. *N.L.R.B.*, 365 U.S. 651, and *Perry Coal Company* v. *N.L.R.B.*, 7 Cir., 284 F. 2d 910, is applicable here. Under the circumstances the Board's direction that dues and assessments be refunded is neither authorized nor proper. And we do not reach the question of the Board's authority to order that such refunds, where proper, be made with interest.

It has been approximately two years since the employees involved affiliated with Progressive and established Local 403. None of the employees of Center Point nor any former employee of Quality is a charging party or complainant in these proceedings. No employee has complained of any coercion. The primary objective of Congress in enacting the National Labor Relations Act was to achieve stability of labor relations. *Colgate-Palmolive-Peet Co.* v. *N.L.R.B.*, 338 U.S. 355, 362. And, in *Brooks* v. *N.L.R.B.*, 348 U.S. 96, 103, it was pointed out that "[t]he underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it". We are of the opinion that it would be equally disruptive of a peaceful *status quo* to here enforce the Board's order that Center Point be now required to

bargain with UMW, the charging party. The situation is similar to that which was presented in *Perry Coal Company* v. *N.L.R.B.*, 7 Cir., 284 F. 2d 910 and 291 F. 2d 126, where we held that there need be no bargaining with any union until after a Board-conducted election. The interest of industrial peace, a cardinal purpose of the Act, as well as its spirit and intent, here require only that the employees involved be permitted to express their existing choice concerning collective bargaining representation in an atmosphere free from employer assistance to any union.

The Board's order will be modified by deleting those provisions requiring Center Point to bargain with UMW; requiring the reimbursement of the employees for dues and assessments, together with interest; and by inserting a provision requiring a Board-conducted election. As so modified the order will be enforced.

Enforcement of Order as Modified Ordered.

A true copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

No. 13991

INTERNATIONAL UNION, PROGRESSIVE MINE WORKERS OF AMERICA, AND LOCAL NO. 403, PROGRESSIVE MINE WORKERS OF AMERICA, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 14001

CENTER POINT BLOCK COAL CORPORATION, AN INDIANA CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 14043

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

QUALITY COAL CORPORATION, BRAZIL BLOCK COAL AND CLAY CO., INC., AND CARL F. KUMPF, RESPONDENTS

On Petitions to Review and Set Aside, and on Petition for Enforcement of an Order of the National Labor Relations Board.

Monday, June 17, 1963

Before Hon. ELMER J. SCHNACKENBERG, Hon. WIN G. KNOCH, and Hon. LATHAM CASTLE, *Circuit Judges.*

This cause came on to be heard on petitions to review and set aside, and on petition for enforcement of an order of the National Labor Relations Board,

and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the order entered in this cause by the National Labor Relations Board on October 25, 1962, be modified by deleting those provisions requiring Center Point to bargain with UMW; requiring the reimbursement of the employees for dues and assessments, together with interest; and by inserting a provision requiring a Board-conducted election. As so modified the said order will be enforced, and a decree will be entered accordingly in accordance with the opinion of this Court filed this day.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

No. 13991, 14001

INTERNATIONAL UNION, PROGRESSIVE MINE WORKERS OF AMERICA, ET AL. AND CENTER POINT COAL CORPORATION, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for review of an order of the National Labor Relations Board.

No. 14043

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

QUALITY COAL CORPORATION, ET AL., RESPONDENTS

Petition for enforcement of an order of the National Labor Relations Board.

Thursday, August 15, 1963

Before Hon. JOHN S. HASTINGS, *Chief Judge*, Hon. F. RYAN DUFFY, Hon. ELMER J. SCHNACKENBERG, Hon. WIN G. KNOCH, Hon. LATHAM CASTLE, Hon. ROGER J. KILEY, and Hon. LUTHER M. SWYGERT, *Circuit Judges.*

IT IS ORDERED by the Court sitting en banc that the petition of the National Labor Relations Board for rehearing en banc be, and the same is hereby DENIED.

(Swygert, C.J. voted for a rehearing).

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 13991

INTERNATIONAL UNION, PROGRESSIVE MINE WORKERS OF AMERICA, AND LOCAL NO. 403 PROGRESSIVE MINE WORKERS OF AMERICA, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 14001

CENTER POINT COAL CORPORATION, AN INDIANA CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 14043

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

QUALITY COAL CORPORATION, BRAZIL BLOCK COAL AND CLAY CO., INC., AND CARL F. KUMPF, RESPONDENTS

Filed August 15, 1963

DECREE

Before SCHNACKENBERG, KNOCH, AND CASTLE, *Circuit Judges.*

These cases came on before the Court on the petition of International Union, Progressive Mine Workers of America, and Local No. 403 Progressive Mine Workers of America (Case No. 13991) and the petition of Center Point Block Coal Corporation (Case No. 14001) to review and set aside an order of the National

Labor Relations Board dated October 25, 1962, and upon the Board's petition for enforcement of that order (Case No. 14043).

The Court heard argument of respective counsel on May 13, 1963, and has considered the briefs and transcript of record filed in these cases. On June 17, 1963, the Court, being fully advised in the premises, handed down its opinion, enforcing, as modified, the said order of the Board. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Seventh Circuit that:

1. Respondents Quality Coal Corporation, Brazil Block Coal and Clay Co., Inc., and Carl F. Kumpf, their officers, agents, successors and assigns, shall:

a. Cease and desist from:

(1) Assisting and contributing support to International Union, Progressive Mine Workers of America and its Local 403, or to any other labor organization.

(2) In any other manner interfering with, restraining or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local 7365, United Mine Workers of America, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities.

b. Take the following affirmative action which the Board has found will effectuate the policies of the National Labor Relations Act (hereinafter called the Act):

(The omission of the affirmative direction contained in 1.b.(1) of the Order of the National Labor Rela-

tions Board, entered October 25, 1962, from this decree, is found and determined by the Court to be necessary to effectuate the intent of and to carry out the requirement of the Court's opinion herein that a Board-conducted election be held.)

(1) Send to each of their former employees carried on the payroll in February 1961, a copy of the notice attached hereto and marked Appendix A.[1] Copies of said notice, to be furnished by the Regional Director for the Twenty-fifth Region (Indianapolis, Indiana), shall, after being duly signed by Respondents, be sent to the employees at their last known address.

(2) Notify the aforesaid Regional Director, in writing, within 10 days from the date of this Decree, what steps the Respondents have taken to comply herewith.

2. Respondents Center Point Block Coal Corporation and Carl F. Kumpf, their officers, agents, successors and assigns, shall:

a. Cease and desist from:

(1) Giving effect to the collective-bargaining agreement entered into on or about June 3, 1961, with International Union, Progressive Mine Workers of America, or to any extension, renewal, or modification thereof, or any other contract or agreement with said labor organization or its Local 403 which may now be in force.

(2) Recognizing the above-named labor organization or its Local 403 as the representative of any of its employees for the purpose of dealing with it concerning wages, rates of pay, hours of employment or other conditions of employment, unless and until such labor organization shall have demonstrated its exclusive majority representative status pursuant to

[1] Appendix A omitted.

a Board-conducted election among the employees of Center Point Block Coal Company; said election to be held promptly after the expiration of thirty days following the first day the notices in Appendices B and C hereto have been posted, under applicable rules, regulations and practices; it being understood that respondent Center Point Block Coal Corporation need not bargain with any union claiming to represent its employees until the Board has certified the results of the election so held.

(3) Assisting and contributing support to the above-named labor organization and its Local 403, or to any other labor organization.

(4) In any other manner interfering with, restraining or coercing employees in the exercise of their right to self-organization, to form, join or assist any labor organization, including Local 7365, United Mine Workers of America, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities.

b. Take the following affirmative action which the Board has found will effectuate the policies of the National Labor Relations Act (hereinafter called the Act):

(1) Withdraw and withhold all recognition from International Union, Progressive Mine Workers of America, and its Local 403, as the exclusive representative of its employees, unless and until such labor organization shall have been certified by the Board as such representative.

(2) Post at its mine copies of the notice attached hereto marked Appendix B.[3] Copies of such notice,

[3] Appendix B omitted.

to be furnished by the Regional Director for the Twenty-fifth Region, shall, after being duly signed by authorized representatives, be posed immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(3) Mail to the Regional Director for the Twenty-fifth Region signed copies of the notice marked Appendix B * for posting by Respondent International Union, Progressive Mine Workers of America, as provided herein. Copies of said notice, to be furnished by the aforesaid Regional Director, shall, after being duly signed by representatives of Respondents, be forthwith returned for such posting.

(4) Post at the same places and under the same conditions as set forth in (2) above, as soon as they are forwarded by the said Regional Director, copies of the notice marked Appendix C.

(5) Notify the said Regional Director, in writing, within 10 days from the date of this Decree, what steps the Respondents have taken to comply herewith.

3. Respondent International Union, Progressive Mine Workers of America, its officers, agents, successors and assigns, shall:

a. Cease and desist from:

(1) Giving effect to the collective-bargaining agreement entered into on or about June 3, 1961, with Center Point Block Coal Corporation, or any extension, renewal, or modification thereof.

(2) Acting as the exclusive bargaining representative of the employees of the above-named Company for the purpose of dealing with said Company con-

cerning wages, rates of pay, hours of employment or other conditions of employment unless and until said labor organization shall have been certified by the Board as such exclusive representative.

(3) In any like or related manner, restraining or coercing the employees of the above-named Company in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act (hereinafter called the Act).

b. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(1) Post at its offices and meeting halls copies of the notice attached hereto marked Appendix C.[1] Copies of such notice to be furnished by the Regional Director for the Twenty-fifth Region, (Indianapolis, Indiana), shall, after being duly signed by an authorized representative, be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(2) Mail to the aforesaid Regional Director signed copies of the notice marked Appendix C[1] for posting as provided in 2(b)(4) of this Decree. Copies of said notice, to be furnished by the said Regional Director, shall, after being duly signed by a representative of the Respondent, be forthwith returned for such posting.

(3) Post at the same places and under the same conditions as set forth in 3(b)(1) above, as soon as

[1] Appendix C omitted.

they are forwarded by the said Regional Director, copies of the notice marked Appendix B.[4]

ELMER J. SCHNACKENBERG,
Judge, United States Court of Appeals for the Seventh Circuit.

WIN G. KNOCH,
Judge, United States Court of Appeals for the Seventh Circuit.

LATHAM CASTLE,
Judge, United States Court of Appeals for the Seventh Circuit.

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[4] Appendix B omitted.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

SEC. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collec-

tive-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 512

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL UNION, PROGRESSIVE MINE WORKERS OF AMERICA, AND LOCAL NO. 403, PROGRESSIVE MINE WORKERS OF AMERICA, ET AL.

REPLY TO PETITION FOR WRIT OF CERTIORARI

G. WILLIAM HORSLEY,
316 East Adams Street,
Springfield, Illinois,

Attorney for International Union, Progressive Mine Workers of America, and Local No. 403, Progressive Mine Workers of America, et al.

SCHNEPP & BARNES, PRINTERS, INC., SPRINGFIELD, ILL.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No._____

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL UNION, PROGRESSIVE MINE WORKERS OF AMERICA, AND LOCAL NO. 403, PROGRESSIVE MINE WORKERS OF AMERICA, ET AL.

REPLY TO PETITION FOR WRIT OF CERTIORARI

The Petitioner bases its full argument as to why this Court should grant Certiorari, on the proposition that various Circuit Courts of Appeals have conflicting decisions with regard to the instant proposition, and therefore, this Court should grant Certiorari.

The Petitioner is in effect trying to say that this Court should find that the Seventh Circuit has stepped out of line because it has decided two cases adversely to the Petitioner.

We do not believe that the statement that the Seventh Circuit is at variance with other circuits is a correct statement. Each case must be considered in the light of appli-

cable facts. The facts of the instant case have been very plainly stated by the Court in its opinion. We see no need to belabor this matter by further enlarging the statement of facts contained in the opinion of the Court.

The Court specifically found that not a single employee had complained to the Board, nor did any single employee testify and complain as to any acts which had caused him any lack of employment, or any other loss of his rights.

The Petitioner relies upon the case of NLRB vs. Katz, 369 U.S. 736. In that case it must be remembered that the Company and the Union were negotiating for a contract at the time the Company committed the unilateral acts which were the basis for the unfair labor practice. It was upon that basis that the Board ordered its remedy which was affirmed by this Court.

The Petitioner also relies upon the case of Franks Brothers Co., Petitioner vs. NLRB, 321 U.S. 702. In that case the employees had just chosen the Union as their bargaining representative and the Union then attempted to negotiate with the Company without any success and the Company threatened to close the factory and committed many other unfair labor practices, and this Court held that the remedy was proper.

Again, in the case of NLRB vs. P. Lorillard Co., 314 U.S. 512, also relied upon by the Petitioner, the Company had absolutely refused to bargain with the Union and this was the basis for an unfair labor complaint, and this Court held that the remedy compelling the Company to bargain with the Union because of a showing that the Union had a majority status at the time of the refusal to bargain, was proper. But, here again, the facts are different than those involved in the instant case.

The situation in the instant case is almost identical with that found in Perry Coal Company vs. NLRB, 7th Circuit, 284 Fed. 2d 910, where the same Seventh Circuit ordered an election between the same two Unions that are involved in the instant case, only the shoe was on the other foot. In that case, there was absolutely no question but what Progressive Mine Workers had the majority status at the Perry Coal Company mine operated by Peabody Coal Company, and that the Company committed unfair labor acts and absolutely refused to bargain with Progressive even though Progressive had demanded bargaining, after the Company had cancelled the contract. The Circuit Court of Appeals ordered an election and this Court denied Certiorari.

The situation in the instant case is identical with the Perry Coal case except that we believe the instant case is even stronger than the Perry case. In the instant case, a new corporation started doing business and hired only the coal miners that it thought were good employees, it being admitted that the men had no job rights under the new corporation. If there was any duty to bargain with UMWA it was simply based upon a successor employer operating the same kind of business with substantially the same employees and some of the same management as before. The Seventh Circuit did not hold squarely on the proposition as to whether or not Center Point was a successor corporation.

However, we point out that in the instant case the Court in its opinion said,

> ". . . None of the employees of Center Point, nor any former employee of Quality i a charging party or complainant in these proceeding . No employee has complained of any coercion. The primary objective of Congress in enacting the National Labor Relations

Act was to achieve stability of labor relations. Colgate-Palmolive-Peet Co. vs. NLRB, 338 U.S. 355, 362. And, in Brooks vs. NLRB, 348 U.S. 96, 103, it was pointed out that 'the underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it.' We are of the opinion that it would be equally disruptive of a peaceful status quo to here enforce the Board's order that Center Point be now required to bargain with UMW, the charging party. The situation is similar to that which was presented in Perry Coal Co. vs. NLRB, 7 Cir., 284 F. 2d 910 and 291 F. 2d 126, cert. den. 366 U.S. 949, where we held that there need be no bargaining with any union until after a Board-conducted election. The interest of industrial peace, a cardinal purpose of the Act, as well as its spirit and intent, here require only that the employees involved be permitted to express their existing choice concerning collective bargaining representation in an atmosphere free from employer assistance to any union."

It is further significant in the instant case that the Seventh Circuit reversed the Board on the facts and said:

> "We conclude that the record considered as a whole does not support findings or conclusions that Center Point conditioned employment on membership in Progressive or that the employees' membership in Progressive and the payment of dues and assessments were the result of coercion. The rationale of Local 60, Carpenters vs. NLRB, 365 U.S. 651, and Perry Coal Company vs. NLRB, 7 Cir. 284 F. 2d 910, is applicable here."

The foregoing is important because as the Court pointed out the membership was not coerced into joining Progressive and the Court specifically rejected the argument of the Petitioner in its Statement of Facts that the statements of Carl Kumpf were coercive. We call the attention of this

Court to the opinion of the Seventh Circuit, particularly that portion found on pages 30 and 31 of the Petition for Certiorari. It must be remembered that the facts in this case were absolutely undisputed and the conclusions reached based upon undisputed facts.

We respectfully submit that if the facts in the instant case were disputed, or in any way showed that any employee had been mistreated, or lost his job, or lost any rights, then we might have a different situation. However, we respectfully submit that the decision of the Circuit Court of Appeals in the instant case is not in conflict with any previous holding of this Court or any other Circuit Court of Appeals considered in the light of the facts applicable in the instant case, and, therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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